(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
City of Marshall, Minnesota	)	CWA Appeal No. 00-9
Docket No. 5-CWA-013-1998	)	

[Decided October 31, 2001]

DECISION AND REMAND ORDER

Before Environmental Appeals Judges Scott C. Fulton, Kathie A. Stein, and Edward E. Reich.

CITY OF MARSHALL, MINNESOTA

CWA Appeal No. 00-9

DECISION AND REMAND ORDER

Decided October 31, 2001

Syllabus

This is an appeal by the U.S. EPA Region V and EPA's Office of Regulatory Enforcement (collectively the "Region") from an Initial Decision issued by Administrative Law Judge William B. Moran ("Presiding Officer") imposing upon Respondent, the City of Marshall, Minnesota ("Marshall"), a civil penalty of $6,000 for violations of section 309(g)(1)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A), arising from the alleged illegal application of sewage sludge on agricultural land in contravention of regulatory requirements codified at 40 C.F.R part 503.

The Region contends that the Presiding Officer erroneously reduced the $52,000 penalty the Region had proposed to $6,000. According to the Region, the Presiding Officer clearly erred in finding that Marshall had established a defense under 40 C.F.R. § 503.2(a), which provides a deferred compliance date for facilities that require construction of new pollution control facilities as a means of achieving compliance. The Region also argues that the Presiding Officer failed to consider in his penalty assessment evidence relative to Respondent's culpability as required by 40 C.F.R. § 22.27(b)

Held: (1) The Board upholds the Presiding Officer's conclusion that Marshall met its burden of presentation and persuasion in establishing a defense under 40 C.F.R. § 503.2(a). To sustain a defense under section 503.2(a), Marshall did not have to prove that construction of new pollution control facilities was the only means by which it could achieve compliance with part 503 regulations, nor did Marshall have to demonstrate that it achieved immediate compliance upon completion of construction. Rather, the pertinent question is whether, at the time the decision was made to pursue construction as a means of achieving compliance with the part 503 standards, Marshall had an objective good faith basis for believing that construction was the appropriate strategy. The Board finds no basis for rejecting the Presiding Officer's conclusion that this test was satisfied under the facts and circumstances of this case.

(2) The requirement in 40 C.F.R. § 22.27(b) that a presiding officer provide a detailed discussion of how the penalty assessed relates to the applicable statutory penalty factors serves the purpose of ensuring both that interested parties are fairly informed of the reasons driving a presiding officer's penalty assessment and that the

presiding officer's reasons for the penalty assessment can be properly reviewed on appeal. Under the facts and circumstances of this case, the Presiding Officer's analysis concerning Marshall's culpability was sufficiently clear and detailed to satisfy the requirements of section 22.27(b).

(3) Notwithstanding the Board's determination that the Initial Decision generally conforms to the requirements of 40 C.F.R. § 22.27(b), the Board remands the case to the Presiding Officer to examine and explain whether the penalty calculation should be reassessed in light of the significant upward adjustment in the number of established violations found by the Presiding Officer, as reflected in an Errata issued after issuance of the Initial Decision.

Before Environmental Appeals Judges Scott C. Fulton, Kathie A. Stein, and Edward E. Reich.

Opinion of the Board by Judge Fulton.

I. *INTRODUCTION*

Appellant, U.S. EPA Region V and EPA's Office of Regulatory Enforcement (collectively, the "Region"), appeals an Initial Decision issued by Administrative Law Judge William B. Moran ("Presiding Officer"), imposing upon Respondent, the City of Marshall, Minnesota ("Marshall" or "City"), a civil penalty of $6,000 for violations of section 309(g)(1)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A), arising from the application of sewage sludge to agricultural land in connection with the operation of a wastewater treatment plant.

The Region contends that the Presiding Officer erroneously reduced the $52,000 penalty it had proposed to $6,000 in contravention of provisions of the CWA and the consolidated rules of practice governing the administrative assessment of civil penalties at 40 C.F.R. part 22 ("Consolidated Rules"). The Region further contends that the Presiding Officer erred in finding that Marshall had sustained an affirmative defense under 40 C.F.R. § 22.24(b). Respondent does not appeal the Initial Decision.

II. *STATUTORY AND REGULATORY BACKGROUND*

This case is predicated on the standards embodied in 40 C.F.R. part 503, concerning the final use and disposal of sewage sludge[1] generated during the treatment of domestic sewage[2] in treatment works.[3] *See* 40 C.F.R. § 503.1(a). The part 503 standards were promulgated pursuant to section 405 of the CWA, which required the Administrator to promulgate regulations to protect public health and the environment from reasonably anticipated adverse effects of certain pollutants in sewage sludge. CWA § 405(d), 33 U.S.C. § 1345(d).

The part 503 regulations were promulgated on February 19, 1993. *See* 58 Fed. Reg. 9248 (Feb. 19, 1993). The standards establish three specific methods for the final use and disposal of sewage sludge: (1) land application to agricultural and non-agricultural land;[4] (2) placement in or on surface disposal sites;[5] and (3) incineration.[6]

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[1]Sewage sludge is defined in the regulations as "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in treatment works. Sewage sludge includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge." 40 C.F.R. § 503.9(w).

[2]The regulations define domestic sewage as "waste and wastewater from humans or household operations that is discharged to or otherwise enters the treatment works." 40 C.F.R. § 503.9(g).

[3]The term treatment works is defined as "either a federally owned, publicly owned, or privately owned device or system used to treat * * * either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature." 40 C.F.R. § 503.9(aa).

[4]*See* 40 C.F.R. §§ 503.10-.18.

[5]*See id.* §§ 503.20-.28.

[6]*See id*. §§ 503.40-.48.

Part 503 applies "to publicly and privately owned treatment works that generate or treat domestic sewage, as well as to any person who uses or disposes of sewage sludge from such treatment works." *Id.*; *see also* 40 C.F.R. § 503.1(b). This regulated community is required to comply with a number of different tasks, which include, for example, the sampling[7] and monitoring of certain pollutants,[8] record keeping,[9] reporting,[10] and adherence to specified management and operational practices.[11]

The standards identify certain pollutants for which monitoring is required and establish ceiling concentrations for those pollutants.[12] Of particular interest in this case is the ceiling concentration for molybdenum. According to the standards, sewage sludge should not be applied to land if the concentration of molybdenum in the sludge exceeds 75 milligrams per kilogram ("mg/kg"). 40 C.F.R. § 503.13(b)(1). In addition to identifying and establishing numerical limits for various pollutants, the standards also provide "pathogen and alternative vector attraction reduction requirements for sewage sludge applied to the land

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[7]*See id.* § 503.8.

[8]*See id.* §§ 503.16, .26, .46.

[9]*See id.* §§ 503.17, .27, .47.

[10]*See id.* §§ 503.18, .28, .48.

[11]*See id.* §§ 503.14-.15, .24-.25, .44-.45.

[12]For instance, the standards provide numerical limits for pollutants such as arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, selenium, and zinc when sewage sludge is to be land-applied. *See* 40 C.F.R. § 503.13(b)(1)-(4).

or placed on a surface disposal site."[13] 40 C.F.R. § 503.1(a); *see also* 40 C.F.R. §§ 503.15, .25, .30-.33.

Section 405(d)(2)(D) of the CWA establishes that the regulations to be developed by EPA were to be complied with "as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of publication." CWA § 405(d)(2)(D), 33 U.S.C. § 1345(d)(2)(D). In keeping with this statutory mandate, the part 503 standards required compliance by February 19, 1994, exempting those facilities that needed to install new pollution control equipment and undergo construction from immediate compliance, and allowing them until February 19, 1995 -- two full years -- to achieve compliance. 40 C.F.R § 503.2(a). Specifically, section 503.2(a) provides as follows:

> Compliance with the standards [for the use or disposal of sewage sludge] shall be achieved as expeditiously as practicable, but in no case latter than February 19, 1994. *When compliance with the standards requires construction of new pollution control facilities*, compliance with the standards shall be achieved as expeditiously as practicable, but in no case later than February 19, 1995.

40 C.F.R § 503.2(a)(emphasis added).

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[13]The term "pathogen" is not defined in the regulations. Nonetheless, the regulations provide a definition for the term "pathogenic organisms." Pathogenic organisms are "disease causing organisms" which include, but are not limited to, "certain bacteria, protozoa, viruses, and viable helminth ova." 40 C.F.R. § 503.31(f). The term "vector attraction" is defined as "the characteristic of sewage sludge that attracts rodent, flies, mosquitos, or other organisms capable of transporting infectious agents. 40 C.F.R. § 503.31(k).

III. *FACTUAL AND PROCEDURAL BACKGROUND*

Respondent owns and operates the Regional Waste Water Treatment Plant, a publicly owned treatment work ("POTW") located in the City of Marshall, Minnesota that generates sewage sludge during the treatment of domestic sewage. On September 28, 1998, Region V filed a complaint against Marshall alleging in three counts violations of 40 C.F.R. §§ 503.13(a), 503.8(a) and 503.15(a), and seeking a $54,000 penalty. *See* Complaint at 4-7. Specifically, the complaint alleged that: (1) Marshall land-applied sewage sludge containing molybdenum in excess of the ceiling concentration found at 40 C.F.R. § 503.13(a) on a total of 117 days between August 1994 and December 1996 ("Count I"); (2) Marshall did not analyze its sludge in accordance with the methods prescribed by EPA at 40 C.F.R. § 503.8(a) ("Count II"); and (3) Marshall land-applied sewage sludge without meeting the pathogen reduction requirements of 40 C.F.R. § 503.10(a) on a total of 10 days between February and March 1994 ("Count III"). Complaint at 4-6.

On April 12, 1999, the Region moved to amend the original complaint by withdrawing the second count, and proposed a penalty of $52,000 for the remaining two counts. Complainant's Motion to Amend and Withdraw Count (Apr. 12, 1999). The Presiding Officer dismissed the second count by order dated May 7, 1999. Order on Motions (ALJ, May 10, 1999).

Marshall answered the complaint on October 27, 1998, denying all allegations, asserting several affirmative defenses, and requesting a hearing. City of Marshall's Answer, Affirmative Defenses and Request for Hearing (Oct. 27, 1998). In a motion for accelerated decision, which was denied by the Presiding Officer,[14] Marshall argued that the violations addressed by the remaining counts in the complaint running from February 19, 1994, through February 19, 1995, should be excused by

[14]The motion for accelerated decision was denied because substantial issues of fact were in dispute warranting an evidentiary hearing. *See* Initial Decision at 1 n.3.

virtue of the deferred compliance date set forth at 40 C.F.R. § 503.2(a).[15] Respondent's Memorandum in Support of Motion for Accelerated Decision (Apr. 1, 1999).

The Presiding Officer held an evidentiary hearing on May 18, 1999. The parties concluded post-hearing briefing in August 1999. On October 3, 2000, the Presiding Officer rendered an Initial Decision, in which he found Marshall liable under Count I for violations of the land-applied sewage sludge requirements on 12 days[16] between September 28, 1995, and November 7, 1995,[17] and dismissed the violations alleged under Count III occurring during February and March 1994 after determining that the defense provided by section 503.2(a) was applicable. Initial Decision at 15. The Presiding Officer reduced the Region's proposed penalty of $52,000 to $6,000.

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[15]As already explained, this provision extends the compliance date of all 40 C.F.R. part 503 standards to February 19, 1995 -- two years after promulgation of the standards when compliance with the standards requires construction of new pollution control facilities. *See* 40 C.F.R. § 503.2(a).

[16]Under the CWA each day of violation is a separate violation, and each distinct violation is subject to a separate daily penalty assessment. *See* CWA § 309(d), 33 U.S.C. § 1319(d); *see also Borden Ranch P'ship v. U. S. Army Corps of Eng'rs*, 261 F.3d 810, 817 (9th Cir. 2001); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1139 (11th Cir. 1990); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 314-15 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987), *remanded*, 844 F.2d 170 (4th Cir. 1988), *judgment reinstated*, 688 F.Supp. 1078 (E.D.Va. 1988), *aff'd in part. rev'd in part on other grounds, and remanded*, 890 F.2d 690 (4th Cir. 1989).

[17]The complaint, by contrast, alleged that violations under Count I ran from August 1994 to December 1996 -- a total of 117 days.

On November 1, 2000, the Region filed a timely[18] notice of appeal, along with a motion for leave to seek reconsideration from the Presiding Officer and a motion to stay the appellate proceedings. The Region initially raised three issues in its notice of appeal: (1) that the Presiding Officer erred in making no determination on liability for 44 days on which there had been land application of sewage sludge containing metals in excess of the ceiling concentrations specified at 40 C.F.R. § 503.13(a); (2) that the Presiding Officer erred in neglecting to consider in his penalty assessment evidence relative to Respondent's culpability as required by 40 C.F.R. § 22.27(b);[19] and that (3) the

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[18]The Region filed its notice of appeal 29 days after issuance of the Initial Decision. Section 22.30(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") establishes 30 days after the initial decision is served as the deadline for filing a notice of appeal of an initial decision. 40 C.F.R. § 22.30(a). This section was last amended on July 23, 1999, as part of the amendments to the Consolidated Rules. *See* 64 Fed. Reg. 40,138 (July 23, 1999). Prior to the amendments, section 22.30(a) provided 20 days to file a notice of appeal of an initial decision. The 1999 amendments to the Consolidated Rules became effective August 23, 1999, and apply "to all proceedings commenced on or after August 23, 1999." *Id.* Proceedings commenced before August 23, 1999, as is the case here, are also subject to the 1999 Consolidated Rules unless application of the rules "would result in substantial injustice." *Id.*

Marshall claims that the notice of appeal was untimely filed because the complaint, hearing, and briefing on this case were commenced before August 23, 1999. According to Marshall, the Region was required to file its notice of appeal within 20 days of the initial decision, as required by pre-1999 rules. Marshall does not, however, provide any convincing support for its argument that the application of the amended rule would result in a substantial injustice. Its only argument to sustain this claim is that "the entire hearing and briefing schedule was based upon the rules at the time, including the penalty calculation and provisions for the Initial Decision discussion of penalty factors" and to subject the Initial Decision to the requirements of the amended rules would "provide a substantial injustice to the City." Respondent's Brief at 2. We are not persuaded by this conclusory statement, in part because it completely disregards the fact that the Initial Decision here was issued a little over a year after the effective date of the new rules. Accordingly, we decline to apply the old 20-day filing rule and find Appellant's notice of appeal is to have been timely.

[19]The notice of appeal referred originally to section 22.27(a), instead of 22.27(b). The Region has moved to amend the notice of appeal to reference section

(continued...)

Presiding Officer erred in applying the defense provided by 40 C.F.R. § 503.2(a) under the facts contained in the record. Notice of Appeal at 1.

On November 15, 2000, the Presiding Officer issued an Errata "clarifying" the number of violations established under Count I. *See* Errata issued by the Administrative Law Judge William B. Moran (Nov. 16, 2000) at 1 ("Errata"). The Presiding Officer explained that his determination regarding the number of established violations should be revised to read, "the instances of recognizable violations within Count I are reduced to include only those loads of land-applied sewage occurring from ***February 20, 1995 through December 1996***, while the violations alleged for Count III, occurring during February and March 1994, are dismissed." *Id*. The Errata notes that, given that the period of violation recognized by the Errata is longer than that contemplated by the Initial Decision, the proper number of days of violation is 56 instead of the 12 days of violation referenced in the Initial Decision. *Id.*

On November 30, 2000, the Board issued an order denying Appellant's motion to stay the appellate proceedings, directing Appellant to file a brief in support of its notice of appeal by December 20, 2000, and indicating that the first issue raised by the Region on its notice of appeal was now moot as a result of the Errata. Order Denying Stay of Proceedings (EAB, Nov. 30, 2000). The Region filed a timely brief ("Appellant's Brief"), and on January 11, 2001, Marshall filed its reply brief ("Respondent's Brief").[20]

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[19](...continued)
22.27(b) on the ground that the citation to section 22.27(a) had been a typographical error. *See* Appellant's Brief at 1 n.2. Because an error of this nature is harmless and we adhere to the generally accepted legal principle that "administrative pleadings are liberally construed and easily amended," we will read the notice of appeal as referring to section 22.27(b). *See, e.g., In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992).

[20]On January 30, 2001, the Region filed a motion for leave to file a response brief and a request for oral argument. By motions dated February 5, 2001, and May 16, 2001, Respondent opposed both requests. Upon consideration of Appellant's and Respondent's motions, we find that neither of Appellant's requests will materially assist the Board in resolving this matter. Therefore, Appellant's requests to file a response brief (continued...)

The Region's appeal of the Initial Decision is thus now limited to the Presiding Officer's penalty assessment and the applicability of the defense provided in section 503.2. Our discussion below focuses on the issue of the defense first, followed by our consideration of the penalty assessment. As discussed, we affirm the Presiding Officer's decision regarding Marshall's affirmative defense for those violations alleged to have occurred between February 19, 1994, and February 19, 1995, but nonetheless remand the matter to the Presiding Officer for reconsideration of the penalty assessment.

IV. *DISCUSSION*

A. *Standard of Review*

In an enforcement proceeding like the one at hand, the Board reviews a presiding officer's factual and legal conclusions *de novo*. 40 C.F.R. § 22.30(f) (conferring authority on the Board to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. __; *see also, In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 447 (EAB 1999). Nonetheless, the Board has stated on various occasions that it will generally give deference to a presiding officer's findings of fact based upon the testimony of witnesses because the presiding officer has the opportunity to observe witnesses and evaluate their credibility. *See, e.g., In re Tifa Ltd.*, FIFRA Appeal No. 99-5, slip op. at 10 n.8 (EAB, June 5, 2000), 9 E.A.D. __; *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992).

The complainant has the burdens of persuasion and presentation to prove that "the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a); *In re LVI Envtl. Servs., Inc.*, CAA Appeal No. 00-8, slip op. at 3 (EAB, June 26, 2001), 10 E.A.D. __. Once the complainant establishes a *prima facie* case, the

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[20](...continued)
and for oral argument are denied.

burdens shift to the respondent to present "any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24(a)*; In re Rogers Corp.*, TSCA Appeal No. 98-1, slip op. at 32-33 (EAB, Nov. 28, 2000), 9 E.A.D. __.

In carrying the burden of proof, the parties are subject to a "preponderance of the evidence" standard. 40 C.F.R. § 22.24(b). The phrase "preponderance of the evidence" means "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." Black's Law Dictionary 1201 (7th ed. 1999); *see also In re Bullen Companies, Inc*., FIFRA Appeal No. 99-14, slip op. at 17 (EAB, Feb. 1, 2001), 9 E.A.D. __. On several occasions the Board has noted that "'the preponderance of the evidence standard means that a fact finder should believe that his factual conclusion is more likely than not.'" *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 363 n.20 (EAB 1994) (preponderance of the evidence means that a fact is more probably true than untrue)).

With these considerations as background, we will now proceed to the analysis of the issues raised on appeal.

B. *Whether the Record Supports the Presiding Officer's Decision to Uphold Marshall's Defense Under 40 C.F.R. § 503.2(a)*

1. *Marshall's Arguments Before the Presiding Officer*

In the proceedings before the Presiding Officer, Marshall raised the defense found at 40 C.F.R. § 503.2(a), which, as already explained, exempted regulated industries whose compliance with part 503 required construction of new pollution control facilities from compliance with the new sludge standards for an additional year after the otherwise applicable regulatory deadline. According to Marshall, Respondent's POTW underwent construction of "new pollution control facilities" in order to

achieve compliance with the new regulations. Respondent's Memorandum in Support of Motion for Accelerated Decision (Apr. 1, 1999) at 3. Marshall supported its arguments with evidence that it spent $5.2 million on facility improvements which "were not completed until the very end of 1994." *Id.* At the evidentiary hearing, Marshall presented testimony of various witnesses who attested that Respondent had been fully aware of the upcoming sludge regulations and that the decision had been made to undergo construction at the facility in part to achieve compliance with the standards. Of interest here is the testimony offered by Robert Byrnes, Mayor of Marshall, and Keith Nelson, City Engineer and Director of Public Works for the City of Marshall.

Under questioning by Marshall's counsel, Robert Byrnes indicated that the plant upgrades were undertaken, in part, in anticipation of the new sludge regulations:

> Q. Prior to 1996 had the City of Marshall taken any efforts concerning their wastewater treatment plants? What efforts had taken place to date prior to 1996?
>
> A. Right. We were involved in an upgrading of our wastewater plant in fact I believe in 1994 we employed an engineering consulting firm of RMC to improve our wastewater treatment plant, not only the capacity but also in anticipation of the pending regulations so that we were sure that our plant was up to speed.
>
> Q. Okay. And so prior to 1996 you personally and City of Marshall had some general awareness of changes in environmental protection regulations that would impact you?
>
> A. Right. Right. In fact, let me correct. I think I said 1994. When we did that [plant upgrade] that was in 1992."
>
> * * * *
>
> Q. Referring your attention to the 1992 city council minutes, what is contained in the

minutes that directly impacts the issue here today?

A. This was -- couple of things. First off [sic] this was on the agenda or a report from Mike Zagar who was the consulting engineer with the firm RMC on the wastewater facilities plan. Reporting to the city council he indicated that the wastewater treatment facility has had good past performance but is growing old and that the Minnesota Pollution Control Region is imposing additional standards and the community is growing residentially, commercially, and industrially and based on that he was recommending that we go through a comprehensive construction project to bring that plant up to speed.

Q. An the city was aware that EPA was in the process off [sic] enacting new sludge rules, is that correct?

A. We were aware that there was new standards that would be coming.

Hearing Transcript ("Tr.") at 154, 156-57.

In addition, Keith Nelson testified concerning those aspects of the construction project aimed to ensure compliance with the new sludge standards. In particular, Mr. Nelson mentioned the construction of trickling filters[21] and activated sludge basins, which according to his

[21]In his testimony, Mr. Nelson explained the function that trickling filters play at Marshall's POTW:

Q. What is a trickling filter?

A. Trickling filter is near the beginning of the process. It's a process of running the water over a medium which has growth on it which helps break down solids which helps lower the BOD requirements. It's a more efficient process than our old process of lagoons and it's less solids we

(continued...)

testimony, help reduce the quantities of sludge that go into the plant's anaerobic digesters, thereby improving the plant's ability to control pathogens.[22]

> Q. [W]hat specific areas of the construction directly helped the City be in compliance with their sludge management and pathogen reduction programs?
>
> A. Both the construction of the trickling filters and the activated sludge basins would help reduce the quantities of sludge that would go to the anaerobic digesters in reducing the quantities we could increase the times and the temperatures.[23]

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[21](...continued)

> talked about earlier. Beyond that we have the activated sludge chambers that are again the same process, there is a combination of bacteria growth in it as well as the air input into the process. We had an additional clarifier that was put in. We had some prescreening grit removal material and there was a splitter box, just some operative improvements as well.

Tr. at 187.

[22]*See also* Joint Stipulations of Fact and Stipulated Exhibits ("JX") 30 (Affidavit of Robert Vanmoer, superintendent for Marshall's waste water treatment facility, indicating that the process improvements have lowered the quantity of sludge production at the POTW, and that such reductions have consequently resulted in improved pathogen and vector attraction reductions).

[23]According to the testimony offered by Mr. Nelson and Robert Vanmoer's affidavit, the temperature increase resulting from the installation of trickling filters has resulted in better control of pathogens. *See, e.g.*, JX 30 ("As a result of the construction undertaken at the Marshall Wastewater Treatment Facility, completed on December 1994, the facility has seen a reduction in loading and biosolids [sludge] production, which has had a direct impact on retention times and temperatures in the anaerobic digester system. These improvements have resulted in improved pathogen and vector attraction reductions in order to comply with 503 regulations.").

Q. Would the City have had any reason to incur that expense but for their desire to be in compliance with EPA regulations?
A. That is part of the reason. The other reason would be to increase capacity of the plant.

Tr. at 178.

Because it purportedly believed in good faith that construction was necessary to achieve compliance with the part 503 standards, and such construction was, in fact, undertaken, Marshall submits that it was entitled to the one-year compliance extension provided by 40 C.F.R § 503.2(a). *See* City of Marshall's Post-Hearing Memorandum at 19-21; Respondent's Post-Hearing Reply Brief at 9; Initial Decision at 7.

2. *Region's Arguments Before the Presiding Officer*

In the Region's view, the defense provided under 40 C.F.R. § 503.2(a) did not apply to Marshall because it only operates where compliance cannot be achieved by any means other than construction of new facilities. According to the Region, "the defense provided by 40 C.F.R. § 503.2(a) requires a respondent to demonstrate that it had absolutely no other alternative besides land application in violation of part 503 standards until Respondent completed construction of pollution control equipment." Complainant's Reply to Respondent's Motion for Accelerated Decision at 5. The Region claimed that in this case non-construction options for sludge disposal were available, such as storage, incineration, surface disposal, and landfilling. Thus, according to the Region, the defense should not apply. Complainant's Reply to Respondent's Motion for Accelerated Decision at 6-8; Complainant's Post Hearing Brief at 30; Initial Decision at 8. The fact that Marshall did not in fact achieve compliance with the pathogen reduction requirements immediately after construction, is further indication, in the Region's opinion, that construction was not the optimal strategy for achieving compliance. *See* Complainant's Post-Hearing Brief at 21-23; Initial Decision at 8-9.

3. *Presiding Officer's Findings*

In his Initial Decision, the Presiding Officer found that there was unrefuted evidence that Marshall determined, upon consultation with engineers, that construction of new pollution control facilities was required. Initial Decision at 14. In particular, the Presiding Officer pointed to evidence that: (1) Marshall had consulted with engineers who recommended the construction of new facilities as a means of meeting Marshall's sludge-related regulatory obligations;[24] (2) Marshall spent $5.2 million in projects to upgrade the facility, which shows that the construction was not just a subterfuge to avoid being cited for violations for a year; and (3) as part of the project Marshall installed trickling filters which affected sludge production and pathogen reduction. *Id.* at 14-15.

The Presiding Officer also rejected the Region's argument that section 503 should be limited to those circumstances in which a facility can demonstrate the efficacy of a construction-based control strategy by coming into immediate compliance after construction. *Id.* at 14. Observing that such a requirement would be unreasonable considering that ordinarily post-construction adjustments and fine-tuning are necessary before achieving operational success, the Presiding Officer

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[24]The record shows that early on, before the promulgation of the new sludge standards, Marshall made the decision to invest in plant upgrades and modifications. *See* JX-24 (City Council's Minutes, Regular Meeting Apr. 20, 1992). One of the considerations as reflected in the record, for the installation of new pollution control facilities, was the imminent upcoming of new sludge standards. In the midst of all the interests the plant upgrade was intended to serve, the City recognized the potential impact of the new regulations, and its necessity to upgrade its facility if it wanted to be able to comply. *Id*. ("Mr. Zagar [consultant engineer] indicated that the Wastewater Treatment Facility has had good past performance, is growing old, that the Minnesota Pollution control Region is imposing additional standards and that the community is growing residentially, commercially and industrially. The alternatives to the improvement * * * include an upgrading of the existing system * * *, to use a single state process * * *, or a two stage process (trickling filter/activated sludge process). Mr. Zagar indicated that the sludge project from 1988 looks ok but that it should be checked after the new EPA Sludge Rules."). Moreover, the testimony offered by Robert Byrnes, Mayor of Marshall, showed that compliance with the new sludge regulations was one of the concerns and main purposes of the construction. *See* Tr. at 154, 156-57.

concluded that Marshall was entitled to the one-year extension in view of its good faith reliance on the civil engineers' advice. *See id*.

4. *Region's Arguments on Appeal*

On appeal, the Region argues that the Presiding Officer erred in adopting an overbroad, "global" interpretation of the term "required," as used in section 503.2, which led him to incorrectly conclude that Marshall had established a *prima facie* case for application of the defense. Appellant's Brief at 15-16. In general, the Region's arguments are that Marshall did not show that non-construction strategies for controlling sludge were unavailable and likewise failed to show that the principal purpose of the construction project was to achieve compliance with the sludge regulations. According to the Region, the most likely intent of the construction project was to accommodate city expansion rather than managing sludge. *Id.* at 16-18.

The Region argues that even if the Presiding Officer was correct in concluding that Marshall had made a *prima facie* case for the application of the defense, he erred in concluding that Marshall had sustained its ultimate burden of persuasion in view of countervailing evidence in the record. In particular, the Region points to the fact that Marshall did not achieve compliance immediately after construction as evidence not only that construction was not required, but that it was a less effective strategy for attaining compliance with part 503 than other sludge disposal options -- options which, according to the Region, Marshall did not consider. *Id*. at 20-22.

5. *The Presiding Officer Did Not Err in Finding that Marshall Had Established a Section 503.2(a) Defense*

The Region's interpretation of the reference in the regulations to "requires" strikes us as overly restrictive and absolute. In the Region's view, to invoke the section 503.2(a) defense, one has to show that there was "absolutely no other alternative" to construction as a means of controlling sludge. Complainant's Reply to Respondent's Motion for Accelerated Decision at 5. Since the other forms of disposal sanctioned by the regulations -- incineration, off-site disposal at an approved sludge

disposal facility, and off-site disposal at a landfill -- would appear to be at least theoretically available in most circumstances, it is difficult to discern a circumstance in which there would be "absolutely no other alternative" to construction for addressing sludge disposal. We are disinclined to construe the term "requires" in a way that would effectively render the section 503.2(a) defense meaningless. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)("courts should disfavor interpretations of statutes that render statutory language superfluous"); U.S. v. Talley, 16 F.3d 972, 976 n.7, (8th Cir. 1994)("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."); *see also In re City of Moscow*, NPDES Appeal No. 00-10, slip. op. at 12 (EAB, July 27, 2001), 10 E.A.D. __ (same rules of construction apply to administrative regulations as apply to statutes)(citing *Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149 (7th Cir. 1969)).

Significantly, dictionary definitions of "require" contain considerably more texture than the stark interpretation advanced by the Region. The Merriam-Webster's Collegiate Dictionary defines "require" in this setting to mean "to seek for, need" or "to call for as suitable or appropriate." Merriam-Webster's Collegiate Dictionary 995 (10th ed. 1999). Webster, for its part, defines "require" as "to call for as suitable or appropriate in a particular case," or "need for some end or purpose." Webster's Third New International Dictionary 1929 (1993). We find the idea of "appropriateness" embedded in these definitions to be especially instructive for purposes of the interpretive challenge at hand. From this vantage point, we think the question posited by section 503.2(a) is not whether construction was the only option but rather whether it was, under the circumstances, the most appropriate alternative. Moreover, we do not think the question whether construction served a purpose beyond sludge control cuts against Marshall in determining the appropriateness of construction as a means of addressing the sludge regulations. We find nothing in the regulation that supports the Region's suggestion that construction projects with a dual purpose, such as facilitating expansion while at the same time addressing sludge concerns, cannot qualify as a circumstance which "requires" construction.

We also disagree with the Region regarding the temporal focus of the proof needed to substantiate a claim that construction was required to comply with the regulations. The Region argues that we should give significant weight to the fact that construction did not, in fact, result in immediate compliance upon completion. According to the Region, Marshall did not achieve compliance with the molybdenum concentration limit until December 1996, while the construction projects were completed sometime during December 1994. *See* Appellant's Brief at 20. To the Region's way of thinking, this indicates that construction was not the most efficacious way to achieve compliance with the sludge regulations and that other options should have been pursued. While such considerations may not be altogether irrelevant to the inquiry, we share the Presiding Officer's view that the more important question is whether, at the time that the decision was made to pursue construction as a pollution control strategy, Marshall had an objective, good faith basis for believing that construction was the appropriate strategy. In answering this question, consideration of the extent to which construction ultimately turned out to be successful is of limited value.[25]

In sum, and based on the foregoing, we find no basis for disturbing the Presiding Officer's determination that, under the facts of this case, Marshall satisfied the elements of the defense provided by 40 C.F.R. § 503.2(a).

B. *Penalty Assessment*

In its appeal the Region contends that the Presiding Officer neglected the requirements of 40 C.F.R. § 22.27(b) by failing to explain *in detail* in his decision how the penalty assessed corresponds to the penalty criteria set forth in section 309(g)(3) of the CWA. Appellant's Brief at 5. Specifically, the Region argues that the Presiding Officer did

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[25]Moreover, we share the Presiding Officer's concern that if the Region's argument were accepted, it might have the effect of denying coverage to many of the facilities that undertook construction as a means of meeting sludge management responsibilities, in view of the typical need for post-construction adjustments and assessments to bring newly installed facilities into optimal operational conditions. *See* Initial Decision at 14.

not adequately address Marshall's "culpability" -- one of the factors enumerated in the Act. *Id.* Given this alleged shortcoming, the penalty assessment, in the Region's view, lacks the element of deterrence contemplated by EPA's civil penalty policies.[26] Appellant's Brief at 23-24.

Our analysis begins with the statute itself. Section 309(g)(3) of the CWA sets forth the following criteria for the assessment of administrative civil penalties:

> [T]he nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3).

Section 22.27(b) of the Consolidated Rules, for its part, directs the Presiding Officer to "explain *in detail* in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b) (emphasis added). In addition, section 22.27(b) establishes that "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." *Id*.

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[26]The Region references *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* ("EPA General Enforcement Policy #GM-22") (Feb. 16, 1984), which recognizes deterrence as one of the key goals in penalty determination. EPA General Enforcement Policy #GM-22 is one of the two general policies on civil penalties frequently used in the assessment of penalties. In the Region's view, the penalty assessed in this particular case "serves not as a penalty to effectively deter future violations, but as a user fee, and consequently a cost of doing business." Appellant's Brief at 2.

In view of the highly discretionary nature of penalty assessment, the requirement that a presiding officer provide a detailed discussion of how the applicable statutory penalty criteria relate to the assessed penalty serves the purposes of ensuring both that interested parties are fairly informed of the reasons driving the presiding officer's penalty assessment and "that the (presiding officer's) reasons for the penalty assessment can be properly reviewed on Appeal". *In re Britton Constr. Co.*, CWA Appeal Nos. 97-5 & 97-8, slip op. at 28 (EAB, Mar. 30, 1999), 8 E.A.D. __. *See In re Pepperell Assocs*., CWA Appeal Nos. 99-1 & 99-2, slip op. at 36 (EAB, May 10, 2000), 9 E.A.D. __ (stating that section 309 does not prescribe a precise formula by which penalty factors must be computed); *see also Tull v. United States*, 481 U.S. 412, 426-27 (1987)("highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the [CWA]").[27] In this vein, we have observed that we should not have to "engage in conjecture * * * in order to discern a Presiding Officer's reasons for deviating from a recommended penalty." *In re EK Assocs., L.P.*, CAA Appeal No. 98-4, slip op. at 22 (EAB, June 22, 1999), 8 E.A.D. __*; In re Pacific Ref. Co.,* 5 E.A.D. 607, 613 n.7 (EAB 1994).

While the Presiding Officer must consider the complainant's penalty proposal, he or she is not constrained by it, even if that proposal is shown to have "take[n] into account" each of the prescribed statutory factors. *In re Employer's Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997). Rather, if the Presiding Officer chooses not to assess complainant's recommended penalty, the Presiding Officer need only explain the basis for that choice in the initial decision. *Id.* Of course, the Presiding Officer must also ensure that the penalty he or she ultimately assesses reflects a reasonable application of the statutory penalty criteria to the facts of the particular case. *Id.*

In the present case, the Region requested a total penalty of $52,000 for the two counts of the amended complaint. Although the

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[27]The preamble to the amendments of 40 C.F.R. § 22.27 indicates that the obligation to explain in detail how the penalty corresponds to the penalty criteria of the Act is not limited to circumstances where the Presiding Officer assesses a penalty different from that in the complaint. 64 Fed. Reg. 40,138, 40,166 (July 23, 1999).

proposed penalty was stated as an aggregate penalty for the two violations (i.e., the Region did not specify an amount for each penalty criterion for each count, nor did it subdivide the overall amount between the two counts), in its proposed penalty analysis the Region provided a discussion relating each one of the statutory penalty criteria to the facts in the record. *See* Complainant's Post-Hearing Brief at 24-33.

The Presiding Officer responded by assessing a total penalty of $6,000 for the two counts. In his penalty assessment, the Presiding Officer did not deploy either of two penalty policies often used in situations like the one at hand -- where no statute-specific penalty guidance is available.[28] *See* Initial Decision at 15. The Presiding Officer rather restricted his analysis to the consideration of the statutory penalty factors.[29]

As stated in the Initial Decision, the Presiding Officer's penalty determination was based on his previous conclusion with regard to section 503.2(a). *Id*. ("[A]s a consequence of the Section 503.2(a) defense, only twelve instances of land applied sewage sludge are recognizable violations.").[30] With this as a predicate, the Presiding Officer began his analysis by referencing the statutory factors. He then

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[28]EPA has not developed a penalty policy specific to the CWA. However, as explained *supra*, in assessing penalties, the Agency often relies for guidance on EPA's two general penalty policies: the *Policy on Civil Penalties* ("EPA General Enforcement Policy #GM-21")(Feb. 16, 1984) and EPA General Enforcement Policy #GM-22.

[29]We have previously held that this falls within the reasonable exercise of the Presiding Officer's discretion. While the regulations governing this proceeding require that presiding officers consider any relevant civil penalty policies in reaching their penalty determinations, *see* 40 C.F.R. § 22.27(b), they are not required to adhere to such policies, since the policies, not having been subjected to the rulemaking procedures of the Administrative Procedure Act, lack the force of law. *In re Wallin*, CWA Appeal No. 00-3, slip op. at 10 n.9 (EAB, May 30, 2001), 10 E.A.D.__; *see also In re B&R Oil Co.,* RCRA (3008) Appeal No. 97-3, slip op. at 32 (EAB, Nov. 18, 1998), 8 E.A.D.__; *In re Employer's Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997).

[30]As already explained, the Presiding Officer eventually clarified that the 12 days of violations under Count I referenced in the Initial Decision was a clerical error and 56 was the proper number of violations.

discussed the evidence in the case pertaining to the issue of penalty, ultimately concluding that a penalty of $6,000 was appropriate. *Id*.[31]

On appeal, the Region challenges the Presiding Officer's penalty assessment as deficient in its analysis of the statutory factors, and, in particular, of the culpability factor. In the Region's view, the Presiding Officer's analysis in this regard is not sufficiently detailed and therefore does not conform to section 22.27(b) requirements.[32]

While it is true that the Presiding Officer's decision does not discuss all of the evidence on a factor-by-factor basis, and that the analysis of culpability-related evidence is thus not organized around an explicit reference to culpability, it seems fairly plain that the Presiding Officer did, in fact, consider and factor into his penalty assessment evidence in the record bearing on the issue of culpability.[33] To the point,

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[31]The Presiding Officer further indicated that "even if it had been determined that the Section 503.2 defense was inapplicable, the court would have departed from the penalty proposed." Initial Decision at 15.

[32]It bears noting that the "explain in *detail*" requirement of section 22.27 is a relatively recent addition to the rule. Section 22.27(b) was last amended on July 23, 1999, as part of the amendments to the Consolidated Rules. *See* 64 Fed. Reg. at 40,166. Prior to the amendments, section 22.27(b) read as follows:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

[33]Throughout his opinion the Presiding Officer makes reference to indicia of Marshall's good faith and cooperative behavior. *See* Initial Decision at 14, 16-17 (references to Marshall's reliance on the advice of consultant engineers, and cooperation with EPA throughout the proceedings). Moreover, there is explicit discussion of (continued...)

based on the evidence adduced at trial, the Presiding Officer fairly clearly rejected the Region's argument that Marshall had acted in dereliction of its regulatory obligations and rather concluded that the City had exercised good faith and diligence in attempting to respond to its regulatory challenges.

While we grant that the Presiding Officer's analysis of the culpability factor might have been clearer had he organized his discussion of the evidence relating to culpability more clearly around the culpability factor, this is not a case in which we have to strain or engage in conjecture to determine how the Presiding Officer addressed this factor.

In sum, based on our review of the Initial Decision, and under the facts and circumstances of this case,[34] we conclude that the Presiding Officer's analysis concerning Marshall's culpability satisfies the requirements of section 22.27(b) and its underlying principles. The

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[33](...continued)
evidence bearing on the question of culpability. For example, the Presiding Officer indicated that Marshall "should have waited for the lab results before applying the sludge to land; to do otherwise renders the regulation a nullity." *Id.* at 16. The Presiding Officer also observed that "[s]uggestions by EPA that the City intentionally or recklessly disregarded the AO are unfair characterizations, unsupported by the record." *Id*.

[34]We note that this is not a case in which the Region provided the Presiding Officer a detailed or itemized penalty analysis. There was not, for example, a specific penalty number proposed in conjunction with the culpability factor. Rather, as stated, the Region came up with an aggregate penalty number based on the totality of the relevant considerations. *See* Tr. at 115-16 (testimony of Mr Aistairs, EPA's Region 5 sludge program manager, on the proposed penalty); Complainant's Post Hearing Brief at 24-33; *see also* Initial Decision at 15 ("Further, the Court notes that the record contains no evidence of EPA's allocation of penalty amounts ascribed for each statutory criterion for each Count * * *. Nor was there particular administrative certainty that the $54,000 originally sought was correct. As Mr. Aistairs explained, he inherited the file and the proposed penalty figure from another. When asked if he would reach the same valuation for the penalty he responded: 'I may have and may not have'."). In our view, the level of analytical precision expected of presiding officers is not unrelated to the level of precision inherent in the Region's proposed penalty in the first instance. In a case like the one at hand, where the proposed penalty was itself somewhat summary, we think the Presiding Officer's analysis was sufficiently detailed.

Presiding Officer analyzed the evidence submitted at the hearing, reasonably applied the statutory penalty criteria, and adequately explained his reasons for departing from the penalty proposed by the Region.

Here, based on the testimony and evidence adduced at the evidentiary hearing, the Presiding Officer concluded that Marshall, in determining that construction was required, acted in good faith reliance on the civil engineers' advice. *See* Initial Decision at 14. As already stated, we generally give deference to findings of fact based on testimonial evidence received at trial. *See supra* section IV.A. We see no basis for departing from that practice here. Accordingly, we uphold the Presiding Officer's conclusion that Marshall met both its initial burden of presentation and its ultimate burden of persuasion in establishing a defense under 40 C.F.R. § 503.2(a).

However, while we find no error in the Presiding Officer's analysis of the statutory factors, remand is nonetheless necessary. The Region correctly points out that while the Errata served to increase the number of instances of violation from 12 to 56, the Presiding Officer did not explain how this adjustment affected his penalty analysis. At the very best, the Errata intimates that no further changes to the Initial Decision are required. Errata at 1 ("[A] reading of the decision as a whole makes it clear that all charged instances were considered."). Given, however, that the difference between 12 violations and 56 violations -- a nearly five-fold increase -- is hardly immaterial, we think *explicit* consideration of the impact of the adjustment on the penalty assessment is warranted and, therefore, remand this penalty assessment for this limited purpose.

IV. *CONCLUSION*

As discussed above, we uphold the Presiding Officer's conclusion that Marshall was entitled to the extended compliance schedule set forth in 40 C.F.R. § 503.2(a), and find that the Initial Decision conforms to the requirements of section 22.27(b). Nevertheless, we remand the case to the Presiding Officer to examine and explain whether the penalty calculation should be reassessed in light of his

upward adjustment in the number of identified violations. The Presiding Officer's decision on remand setting forth the amount of the penalty to be assessed against Marshall shall be appealable to this Board -- only if limited to the issue on remand -- pursuant to 40 C.F.R. § 22.30.

So ordered.